LECTURE NOTES.

AS TO THE EFFECT OF THE REQUIREMENTS OF THE STATUTE OF FRAUDS ON DECLARATIONS OR CREATIONS OF TRUSTS OF LANDS. — (*From Prof. Ames' Lectures.*) — By the seventh section of the Statute of Frauds all declarations or creations of trusts of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party declaring such trusts.

Three views have been advanced as to the effect of the statute in requiring a writing: — *First.*[1] That the statute has introduced a new formality requisite to the validity of such a trust or contract. This view is untenable, since it would bar a subsequent memorandum. *Second.*[2] That the statute introduces a rule of evidence. This view has been countenanced by many writers, but is open to objection, since by it those cases are wrong which hold that, under the seventeenth section of the statute, the memorandum must exist at the time of the bringing of the suit; and the fact that the statute must be pleaded affirmatively, seems inconsistent with this view. *Third.*[3] That the statute has changed the procedure, giving a defence to the party to be charged. The effect of this view is, that if there are the common law requisites of a trust, there is a valid trust, though, if of lands, it is not enforceable unless there is a proper memorandum.[4]

Under this view, *Gardner* v. *Rowe*[5] was correctly decided. It appeared in that case that one Wilkinson, shortly before his bankruptcy, made a transfer of a lease by an indenture reciting that the property had originally been assigned to him upon trust for the transferee. It was held that the transfer could not be set aside by Wilkinson's creditors, the jury having found that the original conveyance to him was in fact upon trust.[6]

On the same principle, if an oral contract to sell land is made before the marriage of the grantor, and a conveyance in accordance with the contract is made after the marriage, his wife has no dower in the premises.[7] Again, suppose that A agrees orally to convey land to B, and, later, agrees in writing to convey the same land to C. He then conveys to B, who has notice of the written contract with C. B is entitled to hold the land.[8]

In *Hutchinson* v. *Tindal*[9] the complainant claimed the land in question by a title superior to that of the defendant. The defence was

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[1] Smith on Contracts, p. 117; *Marsh* v. *Hyde*, 3 Gray, 331, 333.

[2] Browne on Statute of Frauds, § 115, and note *a*.

[3] "The Effect of the Seventeenth Section of the English Statute of Frauds." 9 Am. Law Rev. 434.

[4] In *Wheeling Ins. Co.* v. *Morrison*, 11 Leigh (Va.), 354, at 365, the Court says: "A parol contract is not void by the Statute of Frauds, though its obligation may be repelled by the party sought to be bound by it. The protection is introduced for his benefit by the statute, and may, of course, be renounced by him. If he is willing to abide by it; if disdaining the *mala fides* of breaking his plighted faith, merely because the ceremonies of the law have been neglected, he recognizes the contract and confesses its obligations, shall it not be enforced? Let the unvarying course of equity cases answer the question. How can it be objected by a third person, that the contract which the party himself acknowledges and claims to be valid and binding upon him is not to be so considered? The pretension I conceive to be utterly without foundation."

[5] 3 Simon & Stuart, 346; Ames' "Cases on Trusts," 187.

[6] *Patton* v. *Chamberlain*, 44 Mich. 5; *Jamison* v. *Miller*, 27 N.J. Eq. 586; *Siemon* v. *Schurck*, 29 N.Y. 598; *Cramer* v. *Blood*, 48 N.Y. 684; *Powell* v. *Ivey*, 88 N.C. 256; *Hyde* v. *Chapman*, 33 Wisc. 391; *Sackett* v. *Spencer*, 65 Pa. 89; *Ocean Nat. Bank* v. *Hodges*, 9 Hun. 161; *Hays* v. *Reger*, 102 Ind. 524, accord. But see *Smith* v. *Lane*, 3 Pick. 205; *Holmes* v. *Winchester*, 135 Mass. 299. Compare *Bancroft* v. *Curtis*, 108 Mass. 47.

[7] *Oldham* v. *Sale*, 1 B. Monr. 76.

[8] *Dawson* v. *Ellis*, 1 Jacob & Walker, 524; *Clark's admr.* v. *Ruck*, 7 B. Monr. 583.

[9] 2 Green, Chan. 357; Ames' "Cases on Trusts," 194.

a secret trust, which the defendant was willing to carry out; but it was held that the allegations respecting the trust were not proved by the mere answer of the defendant, which was not responsive to the bill, and that the plaintiff must prevail. In *Jamison* v. *Miller*[1] the Court said, referring to this case: "If the fact of a trust be proved by evidence competent to establish it as against the complainant, I see no reason, either in principle or the authorities, to doubt that an answer signed would be a sufficient manifestation of the trust to satisfy the statute, whether responsive to the bill or not."[2] It would seem, therefore, that in *Hutchinson* v. *Tindal*, if the secret trust had been proved by competent evidence, the allegations of the defendant would have been a good defence by way of plea. Therefore, the decision in the case is not consistent with *Gardner* v. *Rowe*.

RECENT CASES.

AGENCY — IMPUTED KNOWLEDGE. — Ship-owners instructed a broker to reinsure an overdue ship, "lost or not lost." The broker, while acting in this behalf, acquired knowledge material to the risk, which he did not communicate to the owners. The latter afterward secured a policy through another agent. The ship had, in fact, been lost some days before the insurance was applied for, but neither the owners nor the last agent knew it. *Held*, that the owners could recover on this policy, the knowledge of the first broker not being attributable to them. *Blackburn* v. *Vigors*, 12 Ap. Cas. 531.

AGENCY — LIABILITY OF PRINCIPAL FOR AGENT'S MISREPRESENTATIONS. — The general superintendent of a company, for the purpose of securing a loan from the defendants on his individual account, represented that he had grain stored in the company's warehouse, when, in fact, he had none. On his giving them a receipt for it in the name of the company, the defendants advanced the money. *Held*, the company is not liable on the receipt. But where the defendants had loaned money on a receipt identical with this one to a third party, the Court held the company liable. *Planters' Rice-Mill Co.* v. *Olmstead*, 3 S.E. Rep. 647 (Ga.).

ATTACHMENT. — Plaintiff conducted a saloon through an agent who had a license in his own name and represented himself as owner. Liquors were attached as the property of the agent. The plaintiff brought an action of replevin, and it was held that where the sale of liquor without a license is illegal, such property is not subject to attachment, because it cannot be sold. *Barron* v. *Arnold*, 11 Atl. Rep. 298 (R.I.).

BILL OF LADING — PERILS OF THE SEA. — Rats gnawed a hole in a pipe connecting the bath-room of a vessel with the sea, and sea-water entered and damaged the cargo. It was held, reversing a decision of the Court of Appeal, that the injury was caused by a peril of the sea, within the exception in the bill of lading, and the carrier was not liable. A peril of the sea is "a sea damage, occurring at sea, and nobody's fault." *Hamilton* v. *Pandorf*, 12 Ap. Cas. 518.

CHECKS — FORGED SIGNATURE. — A forged check was paid by the bank on which it was drawn, and the drawer did not discover the forgery for seventeen days after his book was balanced up and the check returned. He then gave notice to the bank. It was held that it was not too late for him to set up the forgery. The Courts distinguish between checks in which the amount is raised and those in which the signature is forged. A depositor has a complete right to assume that the bank has only paid the checks signed by himself, and is under no obligation to investigate for the benefit of the bank. If he gives notice of a forgery whenever it comes to his notice, it is the most that can be required of him. *Cincinnati National Bank* v. *Creasy*, 18 Weekly Law Bulletin, 410 (Superior Court of Cincinnati).

[1] 27 N.J. Eq. 586, at 593.

[2] See also *Patton* v. *Chamberlain*, 44 Mich. 5.